

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JEFFREY MEYERS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,011,753
<b>GREAT BEND PACKING COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>FIDELITY &amp; GUARANTY INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the July 20, 2004 Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Appeals Board (Board) heard oral argument on December 21, 2004.

**APPEARANCES**

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Orvel B. Mason of Arkansas City, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations listed in the Award.

**ISSUES**

Claimant was awarded eight (8) weeks of temporary total disability compensation (TTD) for the period of July 24, 2003 through September 17, 2003. No permanent partial disability compensation (PPD) was awarded because the ALJ found claimant failed to prove he suffered a measurable permanent impairment of function or disability. Claimant seeks review of the ALJ's finding concerning the nature and extent of claimant's injury. Claimant relies upon the opinion testimony of Dr. Frederick Smith, who diagnosed claimant

as suffering from de Quervain's syndrome with a loss of grip strength and a loss of range of motion. Dr. Smith rated claimant's impairment as 30 percent to the right upper extremity under the *Guides*.<sup>1</sup> Dr. Smith subsequently amended his opinion to a 20 percent impairment. Claimant argues that Dr. Smith's rating opinion is uncontradicted and should be adopted. The record contains no other medical testimony or reports.

Respondent argues that claimant is not entitled to any temporary total disability compensation because he was fired by respondent under its attendance policy for probationary employees and because claimant did not have restrictions that prevented him from engaging in any type of substantial and gainful employment. Respondent argues that the ALJ was correct in disregarding Dr. Smith's functional impairment rating because he improperly utilized the *Guides*. In addition, Dr. Smith's opinions are not credible.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant started working for respondent May 7, 2003 in the maintenance department of the bakery. Claimant worked second shift which is 4:00 p.m. until 2:00 a.m., six days on followed by two days off.

Claimant testified that on Sunday, June 1, 2003, while finishing the last job for the evening he was replacing a large fluorescent light bulb that had burned out. Claimant was standing on a three-foot stepladder, snapping the cover back on the light fixture when the ladder slipped out from under him and he fell backwards a couple of feet and landed on his right hand.

As this was a Sunday evening and there were no supervisors in the plant claimant testified he reported the injury to a co-worker, Terry Richards. Claimant told Mr. Richards he did not think his hand was broken as he could still move it. Claimant went ahead and finished out the shift that night. Claimant testified that after getting home his hand started hurting so bad and "throbbing"<sup>2</sup> that he went to the Veteran's Administration Hospital (VA) in Wichita.

The doctor at the VA diagnosed claimant with a broken scaphoid bone. The next day, Monday, claimant reported the accident to the company nurse and Mr. Larry Kubichek. Larry Kubichek is the personnel director. Respondent had claimant come in the next day and fill out paperwork and medical care was then transferred to Central Orthopedics Group in Great Bend, Kansas. There claimant treated with Randall Hildebrand, M.D.

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>2</sup> P.H. Trans. at 19.

Claimant first saw Dr. Hildebrand on June 5, 2003. Dr. Hildebrand is an orthopedic surgeon. At that time claimant was complaining of pain in the right wrist. Dr. Hildebrand reviewed medical records and took claimant's history. He diagnosed claimant with a non-displaced scaphoid fracture and placed claimant in a long arm cast. Dr. Hildebrand recommended claimant return for followup and to obtain an x-ray out of the cast. At that time Dr. Hildebrand imposed work restrictions of desk work and left-handed work only beginning June 9, 2003.

On June 9, 2003, claimant returned to work for respondent and was put to work in the parts room doing inventory. During this entire period claimant was on probationary status with respondent. On July 11, 2003, claimant was terminated from respondent due to a violation of their absenteeism policy.

Claimant saw Dr. Hildebrand next on June 17, 2003. On that day claimant had complaints of significant pain along the dorsum of his thumb. Claimant also had tenderness over the snuffbox and over the first dorsal compartment tendon as well as a positive Finkelstein's test. Upon review of claimant's x-rays Dr. Hildebrand noted claimant had "no obvious radiographic healing yet."<sup>3</sup> He treated claimant with a steroid injection and placed him in a long arm thumb spica cast with the recommendation that he followup in two to three weeks with a repeat of x-rays. He then would probably put claimant in a short arm cast. He continued him on limited work with his left hand.

Claimant was seen by Dr. Hildebrand again July 1, 2003. On that day claimant had complaints of pain sometimes on the radial aspect of the wrist and sometimes more ulnarly. X-rays revealed a non-displaced scaphoid fracture and that it remained in excellent alignment. A short arm thumb spica cast was applied and he recommended claimant check back in four weeks. Dr. Hildebrand continued claimant's restrictions of desk work and left-handed work only.

Claimant next followed up with Dr. Hildebrand on July 29, 2003. Claimant's cast was removed. Claimant did have tenderness still over the snuffbox as well as the wrist with attempted motion. It was noted that as of that day Dr. Hildebrand could not confirm that the scaphoid fracture was healed. Dr. Hildebrand ordered a CT scan of the longitudinal axis of the scaphoid to confirm healing. He also asked claimant to get a thumb spica splint to use part of the time and requested to see claimant back after the CT scan. There was nothing in the chart note to indicate if claimant was continued on the previous restrictions of July 1, 2003.

Claimant returned for a followup visit on August 19, 2003. At that time claimant reported he was wearing a brace most of the time and his thumb was getting much better. The CT scan revealed a cyst in the scaphoid but the previous fracture was healed with no

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<sup>3</sup> P.H. Trans., Cl. Ex. 2 (Oct. 2, 2003).

significant mal-alignment. Dr. Hildebrand did note that there was some mild separation of the scapholunate joint but claimant did have excellent ROM of the wrist, minimal tenderness over the snuffbox and the scaphoid tuberosity. At that point Dr. Hildebrand released claimant without restrictions beginning September 3, 2003 and requested claimant to return in a month for followup. There is no record of whether or not claimant saw Dr. Hildebrand again after August 19, 2003.

At the time of claimant's work-related injury he was a 90-day probationary employee for respondent. Respondent operates an attendance policy under a "point system." Under this policy an employee is allowed up to six points to be accrued before termination. The attendance policy given new employees is:

[I]f they [the employee] is [sic] late with a proper call, it's a half a point; if they are late within two hours of start time and no call, it's three quarters of a point; and absence is - - a reported absence is one point. An absence without a call is three points, and on the sixth point, there's termination.<sup>4</sup>

Claimant accrued poor attendance points on June 16, 2003, July 2, 2003, July 8, 2003 and July 9, 2003.<sup>5</sup> His July 9, 2003, absence resulted in a total of six attendance points, which resulted in claimant's termination under respondent's attendance policy. However, if a doctor's note is delivered to the human resources director at the beginning of the employee's shift on the following day, a "sickness" absence can be excused without accruing any attendance points.

With prior accrued attendance violations, the July 9, 2003 absence exceeded the permissible points for a probationary employee. Had claimant produced a doctor's slip indicating he was sick on July 9, 2003, he possibly would not have been terminated. Respondent would have had an opportunity to review the doctor's note and make a determination as to whether to excuse the absence or not.

Claimant was examined by Frederick R. Smith, D.O., on October 22, 2003, at his attorney's request. Dr. Smith is board certified in physical medicine and rehabilitation and also as an independent medical examiner. The record contains no testimony from either the attending physician at the VA Hospital nor from Dr. Hildebrand. Dr. Smith was the only physician to testify. Dr. Smith opined that based on his physical examination of claimant, a review of claimant's medical records and claimant's history, claimant had not suffered a wrist fracture. Instead, Dr. Smith diagnosed claimant as suffering from de Quervain's syndrome, a condition that had manifested itself in limited function of the hand, primarily the grip. Dr. Smith testified after review of claimant's CAT scan he was uncertain if claimant also had some kind of congenital or old problem. He also testified that claimant

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<sup>4</sup> Kubitscheck Depo. at 5 and 6.

<sup>5</sup> *Id.* at 9 and 10.

was not at maximum medical improvement on the day of the examination and believed with therapy claimant would improve.

At Dr. Smith's March 24, 2004 deposition, utilizing the *Guides*<sup>6</sup>, he rated claimant at a thirty (30) percent impairment of function to the right upper extremity on the basis of loss of grip strength in the right hand, primarily to the wrist. However, Dr. Smith testified he did not use the Jamar dynamometer or the rapid alternating testing methods recommended by the *Guides* for determining claimant's average strength of grip by age.

However, at his May 5, 2004 deposition Dr. Smith testified that having reviewed his prior measurements he changed his opinion about the permanent functional impairment to twenty (20) percent impairment of the upper extremity based on the grip strength which is both the hand and the wrist.

Under the Workers Compensation Act, the burden of proof is on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions upon which the claimant's right depends.<sup>7</sup>

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true.<sup>8</sup> To persuade by the preponderance of the evidence requires the claimant to demonstrate the greater weight of evidence in view of all the facts and circumstances.<sup>9</sup>

This claim is for a scheduled injury under K.S.A. 44-510d as claimant has alleged injury to a specific member of the body. K.S.A. 44-510d(a)(23) requires that the "[l]oss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein." The only medical opinion presented was that given by Dr. Smith. Dr. Smith examined claimant on October 6, 2003, a little over the four months after the June 1, 2003 injury. Dr. Smith testified that claimant had not reached maximum medical improvement under the *Guides* and that further improvement was likely. Therefore, it cannot be said that claimant's impairment was permanent nor what the extent of his impairment, as measured by his loss of grip strength, would be. Claimant has failed to prove a rateable permanent impairment of function under the *Guides*.

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<sup>6</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed.).

<sup>7</sup> K.S.A. 44-501(a).

<sup>8</sup> K.S.A. 44-508(g).

<sup>9</sup> *In re Estate of Robinson*, 236 Kan. 431, 620 P.2d 1383 (1984).

On appeal respondent raises an issue concerning the award of temporary total disability compensation. The statute defines temporary total disability as:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

Where no award has been entered, a return by the employee to any type of substantial and gainful employment or, subject to the provisions of subsection(b)(2), a release by a treating health care provider or examining health care provider, who is not regularly employed or retained by the employer, to return to any type of substantial and gainful employment, shall suspend the employee's right to the payment of temporary total disability compensation, but shall not affect any right the employee may have to compensation for partial disability in accordance with K.S.A. 44-510d and 44-510e and amendments thereto.<sup>10</sup>

Claimant had been released to desk work and was limited to using only his right hand. He was limited in his ability to work by the casts or splint he was required to wear. But he was reasonably accommodated by respondent, and, therefore, was not, "on account of the injury. . . completely and temporarily incapable of engaging in any type of substantial and gainful employment." However, when claimant was terminated by respondent he was still under temporary work restrictions, rendering him a one-handed worker, restricted to desk work, and hence severely limiting his ability to find alternative employment. Nevertheless, claimant had demonstrated an ability to perform work that constituted substantial gainful employment. Claimant failed to prove that his job with respondent was a made up position and not one that otherwise existed in the open labor market. Accordingly, claimant has failed to prove that he was temporarily and totally disabled. As such, an award of temporary total disability compensation after his termination is denied.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated July 20, 2004 should be, and is hereby, modified to deny claimant temporary total disability compensation after he was terminated by respondent on or about July 11, 2003, but is otherwise affirmed.

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<sup>10</sup> K.S.A. 44-510c(b)(2).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 2005.

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BOARD MEMBER

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BOARD MEMBER

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- c:     Joseph Seiwert, Attorney for Claimant  
         Orvel B. Mason, Attorney for Respondent and Fidelity & Guaranty Insurance Co.  
         Bruce E. Moore, Administrative Law Judge  
         Paula S. Greathouse, Workers Compensation Director